...RARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 14 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 418

NICHOLS & COMPANY, *Petitioner*

vs.

THE UNITED STATES, *Respondent.*

PETITION FOR RECONSIDERATION OF DENIAL OF PETITION FOR CERTIORARI

FRANK J. DELANY
1317 F Street, N.W.
Washington 4, D. C.
Attorney for Petitioner

WILSON - EPES PRINTING CO. - RE 7-6008 - WASHINGTON 1, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 418

NICHOLS & COMPANY, *Petitioner*

vs.

THE UNITED STATES, *Respondent.*

PETITION FOR RECONSIDERATION OF DENIAL OF PETITION FOR CERTIORARI

The denial of the petition for certiorari leaves standing a decision presumably unique in the annals of the Federal judicial system.

The true character of the decision below, as a travesty of justice, is largely obscured by the court's opinion. That opinion embodies subtle departures from rules of law universally accepted and established. The description of the facts bears little relation to the whole truth (even to the court's own findings). The total effect produced by the opinion is completely misleading.[1]

[1] Because of the gravity of the matters involved, the petition for certiorari was specifically detailed and therefore lengthy. The accuracy of petitioner's statement therein was almost entirely conceded by respondent's failure to take issue in its counter statement. (Respondent's Brief in Opposition pp. 6-13; Petitioner's Reply pp. 15-19) Accordingly, petitioner's references to support the statements here made will be to portions of its petition for certiorari of unchallenged accuracy.

THE IMPORTANCE OF USDA FRAUD, CORRUPTION AND OPPRESSION

Epitomizing that misleading effect is the opinion's severe condemnation of petitioner for making "unsupported charges [1] against Government officials and employees . . . who were doing their duty" (App. 5, Pet. 20).

In thus summarizing the decision, the opinion compresses in a few words the decision's tolerance and disregard of widespread fraud, corruption and oppression within the USDA. Widespread and regular fraud has been proven, as well as oppression. (Pet. 14, 15) Fraud by government officials does not occur for its own sake, but as a companion to their corruption.

Evil in the USDA does not, as an abstract matter, necessarily mean that petitioner should have had judgment. But the undisputed facts show, as petitioner here demonstrates, that *because* of such evil, petitioner's refusal to be a party to it, and its prospective exposure in this proceeding, the wrongs petitioner charged as injuries were committed. In the course of disregarding and interpreting into significance that evil, the decision concurrently disregarded those wrongs to petitioner of which the evil was an integral part.

This Court has recently condemned even the opportunity for and temptation to official wrongdoing, notwithstanding subjective good faith (United States v. Mississippi Valley Generating Company 364 U. S. 520 20 (1961)). It there described official wrongdoing (p. 567) as:

> ". . . an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption."

---

[1] Found fully proved by the Commissioner.

The record here clearly presents that evil, and, even worse, its disregard by the court below with resultant condemnation of petitioner, its victim.

There is no question that petitioner in its troubles with the USDA was facing a corrupt combination of its competitors and government officials. That corruption was self-financing. Fortunes were (and in view of the decision below perhaps still are) made through the fraudulent and discriminatory grading practices of which petitioner was the victim. (Pet. 14)

Fighting such money and its corrupting influence is difficult, even under ideal circumstances. Yet the Commissioner found the facts for petitioner. (Pet. 14, 15)

Petitioner was entitled to expect a full and fair hearing of its charges, before the court established by Congress for that purpose. The issues should have been determined with the "application of the fact-finding tribunal's experience with the main springs of human conduct to the totality of the facts . . .", further described by this court as the "informed experience with human affairs that fact-finding tribunals should bring to this task."[1] (Commissioner v. Duberstein 363 U.S. 278 (1960) at 289 and 292).

The corrupt combination of wealth and government is not even modern. In Thomas More's UTOPIA, written at the beginning of the 16th Century, he stated:

> "So when I consider and turn over in my mind the state of all flourishing commonwealths today, so help me God, I can see nothing but a conspiracy of

---

[1] Chief Judge Marvin Jones has a long and illustrious record of familiarity with agricultural matters of government, in both legislative and executive capacity. (Who's Who in America Vol. 32 p. 1614) He heard and participated actively in oral argument of this cause, demonstrating familiarity with the issues and the record. Unfortunately, he cast no vote in the court's decision. (App. 20)

> the rich, who are aiming at their own advantage under the name and title of the commonwealth."

In any cause a suitor is entitled to a full and fair hearing if the court is to be worthy of its name. The sordid features of this case make such a hearing of compelling importance. Yet petitioner did not receive it, as this petition will demonstrate.

THE BURDEN UPON THIS COURT

Petitioner is not unmindful of the heavy burden its duties impose on this court.[1]

The burden which this case will impose will be much lighter than has appeared so far, particularly with proper presentation by both sides. The disregard by the court below of its own findings simplifies the task confronting this Court, permitting it to make "an independent determination as to the legal conclusions and inferences which should be drawn from them." (364 U.S. at 275)

Petitioner will raise very few issues on which there is any question whatsoever in the evidence, and then only when the factual conclusions permit no real dispute.[2]

It is necessary for this Court to go behind the opinion. But that is required in any event,[3] for the "findings may

---

[1] Nor is respondent. In fact, respondent's brief in opposition to the petition for certiorari seems to have attempted to make capital of that burden by confusing rather than simplifying the issues. Its statement conceded the accuracy of petitioner's statement, yet in argument it claimed the whole case was largely a matter of inferences to be drawn from conflicting evidence—a contention contrary to its concessions. (Resp. Br. pp. 13, 14; Pet. Reply pp. 19, 20)

[2] As for example, matters evidenced by USDA official records concerning the accuracy of it there is no genuine dispute.

[3] The opinion itself indicates that necessity. The condemnation of petitioner for making unsupported charges, if not the purpose, at least has the effect of discrediting petitioner before this Court. Again, the opinion, creates the atmosphere of heat and unfounded charges which it purports to decry (App. 3, 4); and in the innu-

not be aided by statements in the . . . opinion of the Court". (U.S. v. Esnault Petrie, 299 U.S. 301 (1936) at 206); the court's "opinion may be resorted to help interpret, although not to supplement, the court's findings of fact."[1] (U.S. v. Penn. Foundry Mfg. Co. 337 U.S. 198 (1948) at 208).

OFFICIAL FRAUD, CORRUPTION AND OPPRESSION WITHIN THE USDA GRADING SERVICE

The officials honorably discharged of any wrongdoing, while petitioner was being condemned, include Thomas McCurley and Lawrence Dolson, persons at least *officially* responsible for persistent and widespread fraud and corruption in USDA grading of eggs. (Pet. 12-14)

There is no question as to the fact of that corruption. Fraudulent USDA egg grading is established as having regularly occurred in four sample years—1949 through 1952—the very period of petitioner's inability to obtain essential grading services and fair grading, despite contracts entitling petitioner to such service. (Pet. 21-24) Indeed, the four counts which comprised the petition as originally filed in the court below were confined to events within that period, notwithstanding a contrary statement in the opinion.[2] (Pet. 14, 15, 12)

---

endos of thorough search of the record, resulting only in "suspicion" (App. 6; 20) even a slight familiarity with the true facts shows the opinion 'doth protest too much'".

[1] Respondents brief and opposition to the petition contrary to the foregoing rules of law, relied largely upon the opinion of the Court below, as self justifying, thereby impliedly inviting this Court to do the same. (Respondent's brief, pp. 15, 16; petitioner's Reply, p. 21).

[2] The opinion of the court below misstates the facts in saying (App. 5) that "the period covered is prior to plaintiff's contracts." Those contracts were *all* entered into within the four-year period during which fraud was proved to be regular and commonplace.

Besides erroneously describing the period of regular fraud as not embracing the time of petitioner's contracts with USDA, the court below failed to consider that fraud in its most pertinent connection.

The climax of petitioner's troubles with USDA occurred April 15, 1955 with replacement by Dolson of the inspector then assigned to petitioner, with Schoonover, a Chicago inspector.

In a couple of weeks Schoonover ruined petitioner's highly prosperous business. Dolson caused that replacement *shortly after the USDA learned that petitioner's study of USDA grading accuracy would be introduced in evidence in this cause, showing regular and widespread fraudulent grading at Chicago by inspectors working there under Dolson.* (Pet. 14, 15)

Dolson's knowledge of imminent disclosure of widespread fraud obviously supplied a spur to carry out his threat, made in the fall of 1952, to put petitioner out of business for filing a claim against the Government, the basis of Count V. But the opinion ignores this strong motive for his sudden action in April of 1955, and treats the widespread fraud as if solely relevant to evidence personal fraud by McCurley and Young, his assistant charged in Count I. (App. 5; Pet. 18, 19) It thereby repeats use of a false issue, to dismiss widespread fraud as irrelevant to Count V by implying that nothing occurred between Dolson's threat in the fall of 1952, and his installation of Schoonover as a means of petitioner's destruction in April of 1955, which could account for such delayed action![1]

---

[1] The Court states (App. 12, 13): "If Dolson meant to carry out his threat to put plaintiff out of business through unfair grading of its products, as plaintiff alleges, it would seem he would not have waited until April 15, 1955, to set about doing so." That Dolson was not waiting is shown infra, pp. 10, 11. Learning of the imminent disclosure of fraud and corruption he accelerated execution of his threat.

Thus, the opinion, while severely condemning petitioner touches only lightly upon fraud and corruption regular and widespread throughout the USDA grading service, and so treats it as to deprive it of the significance it inherently possessed, as proof under Count V, rather than Count I.

THOMAS McCURLEY AS AN OFFICIAL ONLY DOING HIS DUTY

For a matter of years in the period of proven regular USDA corruption, Thomas McCurley, USDA Illinois State Grading Supervisor, and Lawrence Dolson, USDA Area Supervisor, and McCurley's superior, had, without justification, denied petitioner essential grading service, causing petitioner's specialized plant and equipment to remain idle.[1] (Pet. 21-24)

These wrongs to petitioner—breaches of contract as well as discriminatory practices—were committed for no *valid* or *legitimate* reason. The Commissioner found and reported the undisputed fact that there was no "no evidence that plaintiff was involved in any violation of regulations pertaining to the inspection and grading service of the PMA or in the production of its eggs and egg products" (F 79, R 134).[2] No fault on petitioner's part can justify those wrongs.

Nor does any official explanation exist. In depriving petitioner of that essential grading McCurley and Dolson were false to their official trust as well as injuring petitioner. For it was in the *public* interest that the products were to be marketed with their grade officially determined.

---

[1] These grading services consisted of the grading of frozen eggs (Count II); shell eggs in consumer cartons (Count III); and dressed poultry (Count IV).

[2] The court below on its own motion vacated this undisputed finding to which the respondent had taken no exception (App. 57; Fed. Excep. pp. 191, 192).

What, then, was the reason?

Within that period of proven corruption—in the fall of 1952—McCurley's actual motives became apparent. The time was approaching for him to inspect some millions of eggs sold by petitioner to the USDA for fall delivery.

Shortly prior to that inspection, he asked petitioner to finance him personally in the poultry and egg business, by selling merchandise "on credit". *Only upon petitioner's refusal* did McCurley tell Mr. Nichols that storage eggs *would not* pass inspection.[1] Since the terms of the sale *required* the eggs to have been in storage, this was clear warning to Mr. Nichols that McCurley would reject the lots to be offered. (Pet. 28, 29)

For the USDA State Supervisor to solicit personal financial aid from a large wholesaler under his jurisdiction, and within his power, carries obvious implications of extortion.

To do so shortly before that same official is to grade millions of eggs sold by the wholesaler to the USDA heightens those implications.

To warn the wholesaler, promptly upon refusal of the solicited favor, that the eggs sold could not pass inspection, makes that implication a presumed fact.

To engage in such solicitation and warning at a time when the official had a continuing record of having arbitrarily denied the wholesaler various grading services, generally available to the trade, make the attempted extortion even more clear. The solicited financial aid brought

---

[1] The court below in its findings (F 25, App. 39) statese in reverse order of actual occurrence McCurley's solicitation and subsequent warning of certain rejection, and further states ambiguously that they occurred ". . . about this same time . . ." By failing to state the true time order of these events (Pet. 29) the finding tends to conceal the extortionate character of McCurley's solicitation.

out into the open the reason why those services were wrongfully denied, in violation of contract rights, and in breach of McCurley's official trust.

Yet even further proof of McCurley's extortionate purpose exists.

He soon gave the lie to his own statement that storage eggs could not meet the contract standards by inspecting and accepting the first 11 of the 47 lots tendered by petitioner. It was not until those 11 consecutive and unanimous acceptances had occurred, that McCurley learned that the contracts under which they had been tendered belonged to petitioner, rather than the broker in whose name made. (Pet. 30)

On learning of petitioner's ownership of its broker's contracts, McCurley promptly rejected the remaining 36 (slightly superior) lots, obviously because owned by petitioner, rather than because of their inherent quality. (Pet. 30) The real character of McCurley's warning was thereby conclusively revealed to be part of a continuing extortionate scheme.

Nor is this the end. In his testimony in this case McCurley falsely denied making any advance statement about any difficulty in meeting the contract requirements; and concocted an elaborate, false fabrication to explain his acceptance of the 11 lots first inspected. Were he acting honestly, there would have been no need for that perjury. (Pet. 29, 30)

McCurley, (if not the court below,) was plainly aware of the incriminating character of his misconduct, and sought to conceal it by perjury.

Other perjury by McCurley, and other dishonest grading by him occurred as well. (Pet. 31, 32, 35-38)

This worthy is one of the officials whom the Court found was only doing his duty, and severely condemned petitioner for charging with misconduct.

LAWRENCE DOLSON AS AN OFFICIAL ONLY DOING HIS DUTY

Dolson shares equally with McCurley responsibility for discriminatory denial to petitioner, in violation of Dolson's duties to encourage and promote official grading in the public interest, of various types of grading service over a period of years (Supra p. 7) Those high-handed wrongs were matched by his threat in the fall of 1952 to put petitioner out of business if it dared to seek justice in the manner authorized by law. (Pet. 13, 44)

Dolson carried out that threat. First, by degrees, he deprived petitioner of and for of most and for long periods all of the shell egg grading service essential to petitioner's business. (Pet. 47-50)

Upon learning of the prospect of exposure of regular fraud and corruption by USDA inspectors under and close to him at Chicago, he administered the coup de grace' to petitioner by assigning a Chicago inspector to petitioner's plants as exclusive shell egg grader there. (Pet 50-51) That inspector, Schoonover, swiftly destroyed the highly prosperous and growing Tri-State Marketing Plan, demonstrating Dolson's threat to be no idle one. (Pet. 51-54)

The opinion and the findings of the court below have been shown to have artificially converted Dolson's oppressive threat into public spirited insistence that petitioner comply with laws and regulations. (Pet. 44-47)

To sum up:

There is no question but that Dolson beginning in 1950 with McCurley, denied petitioner the right to market its products with various types of official grading, contrary to his official duty to promote such grading. There is also no question but that Dolson, sensitive to the prospect of suit by petitioner, threatened to ruin petitioner if such claim were filed, and effectively did so. This he

accomplished first by gradually depriving petitioner of the slight grading service petitioner was furnished before Dolson's threat, and on learning of imminent disclosure of regular fraud by Dolson's inspectors at Chicago, by compelling petitioner to use the services of a Chicago inspector who swiftly ruined petitioner's business.

Yet the court condemns petitioner for even making charges against Dolson.

FURTHER PATENT DISREGARD OF AND DISTORTION OF UNDISPUTED FACTS

Brief mention is made below of action by the court further demonstrating the absence of a fair hearing. Although the counts are interrelated, such action will be separately stated, according to the counts involved.

Counts II, III and IV

These counts received no consideration whatsoever by the court, resulting in no hearing at all. The assigned reason for their disregard was, according to the opinion, a statement by petitioner in oral argument admitting that "it had not made out a case on these counts". (App. 1) In this regard the opinion went farther than the court's corresponding finding, which stated only that on oral argument "plaintiff conceded that it had failed to prove it sustained any damages under Counts II, III and IV. . ." (Pet. 17).

Neither concession was made. (Pet. 17, 18).

The court's apparent mistake concerning oral argument, it declined to rectify on motion for reconsideration. (Pet. 21, 63, 64).

That refusal occurred, despite the fact that even such a concession with respect to *recovery* under those counts did not extend to withdrawing the highly persuasive evi-

dentiary character of the facts proved under them, as supporting Counts I and V. (Supra p. 7; Pet. 12, 17-19)

Yet the court made no findings under those counts, even after motion for reconsideration pointed out this indefensible error. (Pet. 21)

As a consequence, there is no question but that in its consideration of Counts I and V, the court below disregarded forceful evidence in petitioner's favor.

Count I

Ironic indeed is the professed *suspicion* of the court below of fraudulent grading by McCurley of the eggs sold, engendered by variances between gradings by McCurley at Peoria, and gradings elsewhere. (App. 6) In disregarding those variances, the court speculates that "perhaps the quality of the eggs offered was not the same. . ."

The record is clear that the eggs rejected by McCurley and Young were slightly superior to the lots accepted elsewhere, and also superior to lots which they themselves accepted before knowing them to belong to petitioner. (Pet. 27, 28). The court simply ignored these critical and undisputed facts.

It is also undisputed that in grading the eggs sold, the USDA used a candler, which greatly magnified and enlarged the scope of observable defects, in effect elevating the contract standards. (Pet. 42, 43)

That fact and that alone entitled petitioner to recovery under Count I. (Pet. 58)

The court deprived it of that effect, by treating it (App. 7) as relevant only "to show partiality" under Count V, rather than simple and clear breach of contract

under Count I. The court then ruled this fact irrelevant on the false issue of its own choosing. (Pet. 42, 43)

COUNT V

Once again, the court creates a *false* issue, resulting in disregard of facts proving the *true* issue.

With respect to grading service furnished petitioner after Dolson's threat, it refers to the graders furnished petitioner, and then proceeds to state that "plaintiff does not assert that any of the foregoing inspectors failed to render fair and impartial service." (App. 12)

The court is correct in its statement, but incorrect in the implications of that statement.

Indeed, petitioner was satisfied with the graders thus enumerated, and wanted to keep them, and have additional graders assigned as well. It was *Dolson's* pretexts that served as the occasion for terminating their services, leaving petitioner for many months with no such grading service at all. (Pet. 47, 48)

This was clear discrimination and oppression, as well as a violation of petitioner's rights to adequate grading service. To say that *petitioner* did not complain about their services would corroborate if necessary, the fact that petitioner wanted *more* such service.

The Weinberg incident was used as a pretext to deprive petitioner of the services of Brown, one of those graders. It also constituted further oppression by Dolson and the USDA in various ways, including suppression of a deposition taken by Weinberg in a suit with petitioner, after cross-examination of Schrimsher the deposition witness. (Pet 50) The court below, in referring to the suppressed deposition, treated that obstruction of justice for petitioner's benefit saying (App. 16):

> "Schrimsher was Weinberg's witness, no doubt, and his testimony must have been unfavorable to Nichols. If it was never put in evidence, so much the better for Nichols."

One can hardly believe that the court below is not familiar with the fact that cross-examination can turn the testimony of a witness against the party who offered him. The absurdity of the court's ruling, therefore, necessarily serves as a measure of the court's impartiality.

The court further concluded that "plaintiff had decided to go out of business, unless it could continue with the grading service it demanded." (Pet. 53, App. 2d) The undisputed facts are that petitioner represented three generations of the Nichols family in this industry (Pet. 10); that at the time petitioner was netting approximately $40,000 per year, despite oppression by the USDA (Pet. 14, 51); and that petitioner did not make a decision to go out of business, but continued in business for several years thereafter. (Pet. 15) In fact, during oral argument, respondent asserted inaccurately, that as of that time, petitioner was still in business. (Pet. 53, 54) Thus this conclusion of the court is contrary to common sense, and the facts of record, and wholly fails to leave any reason for petitioner's ruin except the facts found by the Commissioner, largely adopted by the court in its findings—deliberate ruin by USDA.

CONCLUSION

Of undeniable literary and rhetorical character, viewed in the light of the facts, even as found by the court below, the opinion is a parody with strong aspects of comic opera, a game of make-believe.

Counts II, III and IV, constitute a history of unjustifiable wrongs to petitioner, for many months preceeding and continuing through, the gradings of eggs sold to USDA, by McCurley who graded those eggs. Those counts

the court dismissed from the case in their entirety. They show a persistent wrongful and extortionate scheme by McCurley, expressly revealed by his solicitation of financial aid before immediately grading the eggs sold.

Counts I and V then remained.

The court held proven breach of contract under Count I as failing to prove Count V. It also held proof under Count V failed to prove Count I.

These are only some of the judicial novelties which resulted in dismissal of the complaint.

The result of that dismissal, and the accompanying statements in the opinion, was to vindicate official fraud, corruption, extortion and oppression, and to condemn its victim.

Petitioner respectfully submits that the necessity of preserving the appearances of conformity to the accepted course of judicial proceedings requires this Court to grant the writ in the exercise of its power of supervision, as well as in recognition of petitioner's rights to both procedural and substantive due process.

Respectfully submitted,

FRANK J. DELANY
1317 F Street, N.W.
Washington 4, D. C.
Attorney for Petitioner

Certificate of Service

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

FRANK J. DELANY

Counsel for Petitioners.